Purpose/Benefits

PURPOSES OF COURT-SPONSORED ADR

1. Enhance respect for and gratitude toward the system of public justice.

a. Provide meaningful service to a wider range of cases/litigants.

b. Improve access to the court system and to just dispositions.

2. Provide parties with a cost-effective and earlier alternative to a full "day in court" (alternative to full pre-trial and trial).

3. Enhance the quality of justice: the quality and fairness of litigation.

a. Expand the information base on which decisions are made.

b. Refine the quality of the analyses that inform decisions.

4. Improve the efficiency of dispute resolution: save parties and courts time and money.

5. Encourage parties to accept greater responsibility for resolving their own problems and enhance party self-determination.

6. Increase party participation and satisfaction -- reducing party alienation.

7. Facilitate pursuit by parties of solutions that courts could not provide.

8. Permit parties to determine which values/interests are most important to them and enable parties to pursue values that they could not pursue through litigation. For example: honor and vent emotions.

9. Help parties identify more reliably what their best alternative to trial is (what the best terms are that they could achieve through settlement) – and thus, if they elect to go to trial, to understand better why.

11. Increase the incidence and/or accelerate the timing of settlement.

BENEFITS ADR CAN OFFER LITIGANTS

1. Reduce costs

2. Reduce time

3. Improve information base

4. Improve analysis

5. Increase party involvement – reduce alienation

6. Improve communication and confidence between attorney and client.

7. Improve communication/understanding between opponents

8. Enhance civility

9. Reduce distrust/preserve relationships between opponents

10. Repair/rebuild sense of self

11. Process/honor emotions

12. Preserve privacy/protect confidentiality

13. Expand solution options

14. Quicker, less expensive 'day in court'

SOME POTENTIAL BENEFITS FROM USING A NEUTRAL AND AN ADR PROCESS

1. Identify more reliably what is at the center of the case and what things really divide the parties.

2. Devise a plan to efficiently address the matters that really are important (stay focused on the essentials).

3. Create a crucible effect –

pressing parties to do key homework earlier than they otherwise might,

pressing parties to look at their case more systematically than they otherwise might (until the end of the pretrial period),

creating a focused occasion with an expectation of decision-making.

4. An ADR event can help each party see the case through the eyes of the other side.

5. An ADR event can reduce the likelihood that issues will not be squarely or fairly joined.

6. A neutral host of an ADR event can give the parties something akin to a day in court – an opportunity to be heard.

7. Create a safe environment for any necessary venting or exploration of emotions.

8. A neutral can help reduce (and contain the negative effects of) personality clashes, interpersonal frictions, or strong emotions.

9. A neutral can be the source of a useful and ex parte second opinion about the case overall or some specific aspect of it –

reality check for counsel and client.

10. A neutral can provide help to a lawyer with his client – or provide help to a client with his lawyer.

Client may need to hear a second opinion to bolster client's confidence in his attorney's opinion/advice.

Lawyer may need a second opinion to bolster his own confidence that he is providing reliable advice to his client.

11. Neutral can reduce distortions in negotiations caused by "reactive devaluation."

12. Neutral can reduce the risk that the parties will abandon the negotiations prematurely.

13. Neutral can reduce the risk of false failure:

a. social error that injects counter-productive emotions

b. major analytical error or oversight

c. guessing inaccurately about what settlement terms each party might agree to – thus misidentifying best alternative to going to trial.

Circumstances that Improve the Likelihood that ADR Could Be Productive

(in one or more of several different ways)

– Continuing relationship

– Business considerations likely to play significant role and parties are sophisticated or business savvy.

– Liability seems likely, damages not huge, and it's a fee shifting case.

– Clear disproportion between transaction costs and real case value – and

there is no basis for fee shifting and

no compelling agenda external to the law and evidence.

– One or both of the parties has a keen interest in preserving confidentiality of content of dispute and/or terms of settlement.

– A party clearly needs to vent, to be heard by some neutral person, before he can give rational consideration to settlement.

– Counsel and/or the parties seem unable or disinclined to communicate effectively – so need to be sat down in the same room with a neutral and forced to exchange information and perspectives.

– Counsel are inexperienced and need a second opinion (from an experienced neutral) to gain the confidence they need to seriously pursue settlement or to develop an efficient case development plan.

EARLY REFERRAL TO ADR:

PROMISING CIRCUMSTANCES

1. Disproportion between transaction costs and case value

and the only relief sought is monetary.

2. The pertinent law is well-established and

the evidence can be developed relatively quickly.

3. There is a well-developed 'sociology of valuation'

and injuries have stabilized.

4. Liability is fairly likely under a fee shifting statute.

5. Litigants have strong incentives to end the dispute and move on,

e.g., business entities with continuing relationship or incentive to form relationship.

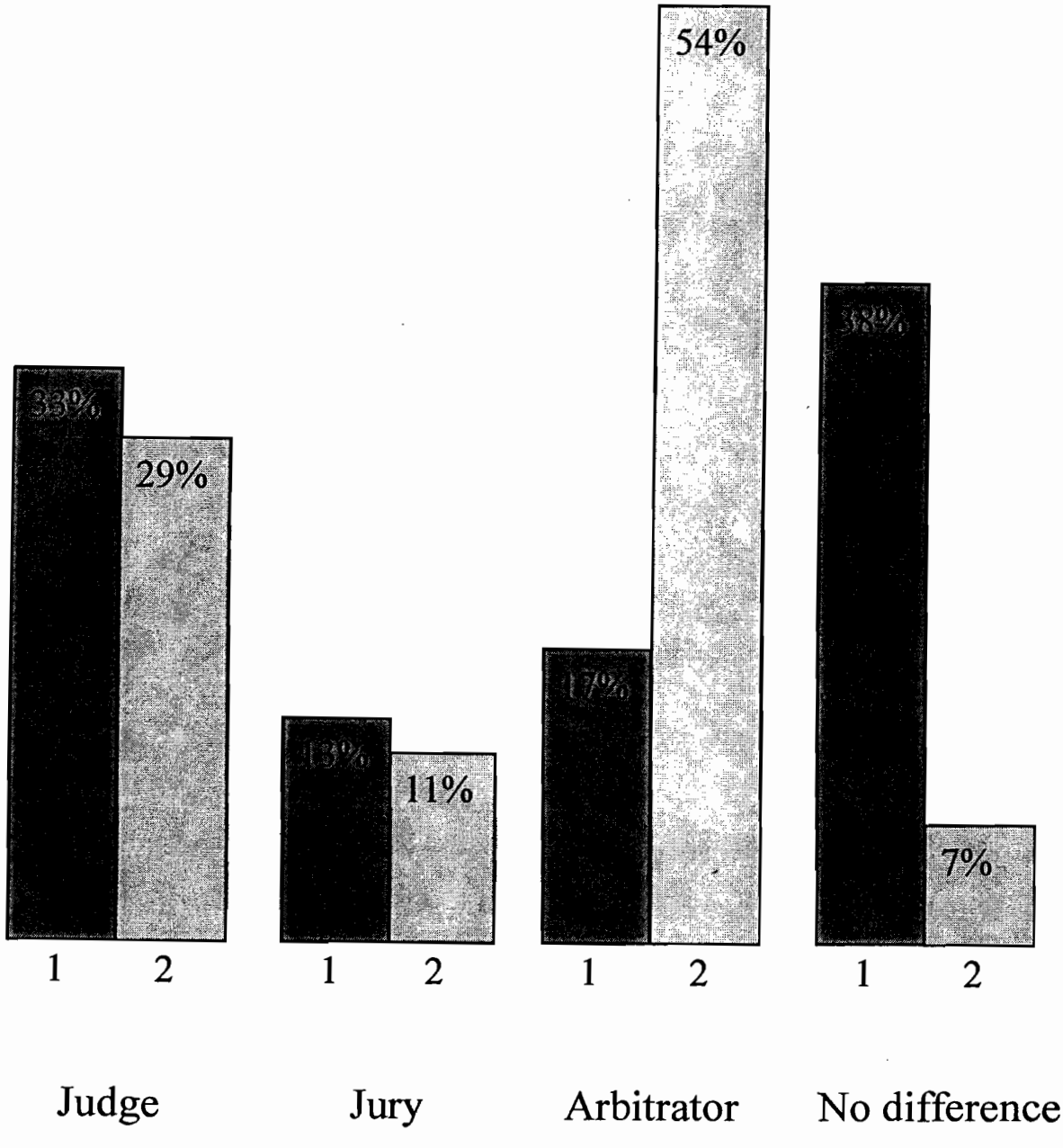
Assessments

Non-Binding Arbitration

Parties surveyed:

1. Who do you think would have been most likely to come up with a decision that was **fair** to everyone?

2. Considering **costs, time and fairness**, who would you prefer to have your cases decided by?



COURT SPONSORED ADR:

VIEWS OF USERS

ENE AND MEDIATION IN N. CA.

- **83% benefits outweigh costs.**

- **98% processes are fair.**

EARLY ASSESSMENT PROGRAM IN W. MO.

- **84% - 94% benefits outweigh costs.**

- **92% processes are fair.**

9th CIRCUIT JUDGES AND LAWYERS

- **92% ADR likely to yield sufficient value to justify its use in most civil cases.**

- **97% judge should raise ADR at first status conference if no one else has.**

Selected Mediation Questionnaire Responses

Questionnaire for Mediators	Overall	Since 1/1/06
Were the parties' statements useful?	Yes: 92% (1968/2155)	Yes: 93% (465/502)
On balance, do you believe that the Mediation procedure resulted in benefits to the parties sufficient to justify the resources that the parties and you devoted to the Mediation process?	Yes: 89% (1936/2174)	Yes: 87% (443/507)

Mediation Questionnaire for Attorneys	Overall	Since 1/1/06
In your view, how fair were the procedures used in the Mediation process?	Fair: 95% (1864/1970)	Fair: 97% (451/467)
In the future, would you volunteer an appropriate case for the Mediation process?	Yes: 97% (1889/1955)	Yes: 96% (441/460)
Overall, did the benefits of being involved in the Mediation process outweigh the costs?	Yes: 83% (1632/1965)	Yes: 84% (391/468)

Mediation Questionnaire for Parties	Overall	Since 1/1/06
In your view, how fair were the procedures used in the Mediation process?	Fair: 90% (1096/1220)	Fair: 93% (243/261)
In the future, would you volunteer an appropriate case for the Mediation process?	Yes: 89% (1049/1173)	Yes: 89% (222/249)
Overall, did the benefits of being involved in the Mediation process outweigh the costs?	Yes: 78% (893/1138)	Yes: 76% (188/246)

Discussing ADR at the ICMC

Tell them why you are raising it:

Some people assume we raise this subject because we want to get rid of you – show you the courthouse door.

That is wrong. I have too few trials as it is – and I prefer presiding at trial to working endlessly on motions.

Required by national and local rules.

Believe it or not, I want to help –

I want to help your clients and you get to the other side of this dispute fairly – and in a way that honors as much as possible your clients' values and interests.

Trial rate is less than 2%

Why? Cost (and delay) – esp. the growing disproportion between transaction costs of litigation and real case value.

Only 7.8% (nationally) of civil cases are resolved by motion for summary judgment.

Even smaller percent are resolved by rulings on motions under Rule 12.

So, unless your case is an outlier, it is almost a certainty that, eventually, it will settle.

So let's start working on that now.

Benefits an ADR Session Can Deliver Even If Settlement is not Likely
(at least not likely at this juncture)

1. Good vehicle for identifying the primary barriers to settlement – informational, legal, emotional, etc –

enabling you to develop a cost-effective plan to attack those barriers.
Consider two-stage case development.

2. Find center of case, sharpen focus of information gathering, and cabin discovery/motion work? Attack transaction costs.

Better than Rule 12 motions and interrogatories for finding the center of the case.

3. Assess opponents (counsel and party).

4. Discover opponent's evidence, arguments, objectives.

5. Showcase strengths of your case and your client to opponents.

6. Teach your own client strengths and weaknesses of the case – and

increase your client's confidence in your competence and your advice.

7. Get second opinions.

8. Help you and your client feel more centered in the decisions you make about going forward.

Increase your client's confidence that he has accurately identified what his best alternative to trial is – and reduce your client's resentment over having to pay your trial bills.

CONCERNS ABOUT ADR

1. **Waste of time – other side will abuse**

2. **Waste of time - premature**

3. **Waste of time - no chance this case will settle**

4. **Real purpose is to pressure parties to settle**

5. **Processes are sloppy – increase risk of unreliable decisions**

6. **Processes are unpredictable and uncontrollable**

7. **ADR increases risk of losing 'client control'**

8. **Agreeing to participate will be seen as a sign of weakness**

9. **Stronger parties use ADR to exploit weaker parties**

10. **By participating we help other side prepare, disclose trial strategy, lose surprise.**

11. **ADR means lawyers make less money**

CONCERNS ABOUT AND OBJECTIONS TO ADR

POSSIBLE DOWN SIDES/RISKS OF ADR FOR PARTIES, LAWYERS, COURTS

In this section, we will identify and respond to concerns that have made some lawyers and parties skeptical about the wisdom of trying ADR in some situations.

1. ADR will be a waste of time because the other side will not participate in an appropriate spirit or will try to use the ADR event only for some tactical purpose (e.g., to string us along, increase our costs, get free discovery, etc.)

The most compelling response to these kinds of concerns is essentially empirical: these kinds of abuses are relatively rare -- so the risk of wasted energies is small – and quite a bit smaller than the risk of wasted energy in traditional litigation.

Safeguards can be put in place that reduce these risks even further. For example, in a conference call before the ADR event the neutral can explain what will be expected of each party and can require each party to bring specified categories of documents and identified key people to the ADR event. If appropriate, the neutral might have separate conversations with the parties before the ADR event in order to explore privately their attitudes and their willingness to proceed in an appropriate spirit (a neutral who concludes that one or both parties will not participate constructively could cancel the ADR session in advance).

2. ADR would be a waste of time because we are not ready; it would be premature.

One purpose of ADR can be to help the parties identify the kinds of considerations that they feel should play the dominant role in making settlement decisions. Sometimes those considerations are based on underlying interests or needs that are substantially independent of the evidence in the case. So the fact that the lawyers have not yet fully developed the evidence may not preclude constructive settlement negotiations.

In many cases, the lawyers and parties do not need to fully develop the evidence in order to have a reliable sense of the likely course of the litigation and/or the settlement value of the case.
And often the value of the case is not large enough to justify the expense of full pretrial litigation (through discovery and motions).

Moreover, good lawyers can use an early ADR event (more efficiently and sometimes more reliably than pleadings, discovery and motions) to make sure they accurately understand what the primary bases are for their opponent's positions and to identify what separates the two sides. An early ADR event can be a legitimate and efficient tool for assessing the strength of an opponent's case, including how much appeal/credibility an opposing party is likely to have with a trier of fact. Good lawyers also can use an early ADR event to develop the most cost-effective plan possible for generating the information or rulings they need to position the case for settlement. Again, counsel should consider a two stage ADR plan – the first to identify what separates the parties and to develop a plan to meet their information needs, then the second ADR event to focus on negotiations.

Discussing with Counsel

Using an ADR neutral who has subject matter expertise also can help reduce the risk that the parties will make unreliable decisions because they don't adequately understand the applicable legal principles or haven't identified the likely sources of significant evidence.

3. ADR would be a waste of time because there is no chance this case will settle.

The trial rate in the federal court here is 1.7%

4. ADR processes are intellectually soft and sloppy -- and using them magnifies the risk of unwise settlement decisions. ADR processes encourage parties to make decisions on the basis of less information than would be generated through full litigation, or less systematic and less analytically reliable consideration of the information.

The magnitude of this risk varies with the complexity of the case and with the nature of the ADR process that is used – but for many matters, this risk is small (or at least lends itself to exaggeration).

Parties can build effective safeguards against these risks into their design of the ADR process they use.

For example, they can structure in advance of the session the sequence in which they will address issues and can develop a plan for acquiring and presenting all the critical information/evidence.

> Parties also can use a two-session strategy: in the first session, they could identify clearly what additional information they need and could develop a plan to acquire that information before the second session. And in the period between the sessions each party could do additional homework and analysis – thus increasing their confidence in the reliability of the bases for their decisions.

Parties also can adjust the role of the neutral to help address this concern; e.g., the parties could use a neutral with deep subject matter expertise and ask the neutral to help them identify all the issues that should be addressed and all the kinds and sources of evidence that are reasonably likely to come into play.

5. Stronger parties use ADR processes to exploit weaker parties.

To some extent, the role of the neutral can be adjusted to help reduce the risk that a stronger party will take unfair advantage of a weaker party, but there is tension between such adjustments and making sure that the neutral stays neutral (and does not slip into looking out for one side's interests more than the other side's).

But in most types of ADR a good neutral will be sensitive to this risk and will terminate the ADR event if it becomes clear that any such exploitation is occurring.

Even with adjustments in the neutral's role, however, many forms of ADR would not be appropriate for parties who are proceeding in pro per and who are not capable of negotiating adequately for themselves.

6. The real purpose of ADR is to pressure the parties to settle.

This is not the purpose of ADR. The purpose of ADR is not to subjugate parties, but to empower them -- to provide them with an opportunity, should they elect to use it, to take the power over their case back from outsiders (e.g., the court system).

The ethical rules under which ADR professionals act explicitly prohibit them from pressuring or coercing anyone – and the courts feel strongly that this prohibition must be vigorously enforced.

A lawyer or party who is concerned about being pressured should say so before the ADR event gets underway – and if not adequately reassured, should feel free to leave.

A party or lawyer who feels pressured during an ADR event is free to leave – and could report the neutral's behavior to the court (in court-sponsored programs) or to an appropriate licensing or regulatory agency (e.g., the bar's disciplinary office).

To reduce concern about being pressured, parties may be permitted to select their neutral – and they can select someone in whom they have full moral confidence.

7. Agreeing to participate in ADR will be seen as a sign of weakness or lack of resolve.

It is a sign of confidence in your case, not weakness, to agree to submit it to honest assessment by a neutral person (with subject matter expertise).

It is a sign of weakness to try to hide your case or your client from exposure to a neutral or to the other side

In some jurisdictions, a lawyer's failure to advise a client about the possible usefulness of ADR could constitute a violation of an ethical obligation and might help support a claim for malpractice.

8. Participation in ADR risks loss of "client control."

Some lawyers fear that in an ADR process they would lose control over inputs to their client and over inputs from their client to the opposing side. Some might fear that their client would be overly influenced by the neutral or by their opponent, or that their client might give away the store, or that what their client does or says in the ADR process might reduce the likelihood of a favorable settlement.

Is the whole concept of "client control" patronizing? Is the goal of "client control" professionally legitimate? Is it an illusion, a figment of an insecure imagination?

If a case is fully litigated, loss of "client control" is inevitable – and the loss will be in public when it really counts (trial, preceded by depositions).

The risk of loss of client control can vary dramatically with the kind of ADR process selected and the role the neutral is asked to play. The risk could be largely eliminated, for example, by using a facilitative mediation process (in which the neutral gives no assessments, no evaluative feedback) that is essentially limited to private caucusing. In such a process, under common confidentiality rules, each party could retain control over what is disclosed to the other parties.

In considering whether to try ADR, wise counsel would weigh the possible trade-offs between some loss of control over the client and what he learns, on the one hand, and, on the other, the gains in control over the character of the process. Individual lawyers have relatively little control over the character of the process, or how it turns, in formal litigation.

9. Participation in ADR will result in disclosure of trial strategy and loss of tactical advantages/surprise.

In many kinds of ADR (e.g., facilitative mediation) there would be no disclosure of trial strategy – in fact, one of the goals of some forms of ADR is to achieve as much separation as possible from the spirit and techniques of litigation.

In many forms of ADR, each party retains control over what is disclosed to the other side (directly or through the neutral) – so parties can keep confidential just about anything they want to keep confidential.

Sometimes a wise lawyer will want to use an ADR event to suggest that she has a powerful trial presentation strategy – because sometimes creating fear of that strategy can serve as a powerful inducement to an opponent to settle.

10. In an ADR process we will simply be helping the other side prepare, doing its work for it, teaching it what it would otherwise be required to learn on its own.

A party can select an ADR process in which it controls what it discloses to the other parties.

Sometimes a lawyer should do some of the work for the other side because doing so advances her client's best interests — e.g., by controlling how sensitive information is acquired or, more significantly, by persuading the other side to agree to favorable settlement terms before unnecessary transaction costs are incurred.

11. Successful participation in ADR will result in counsel making less money (settlement, especially early settlement, results in lower attorney's fees).

Is it ethical to elevate counsel's interests above the client's interests?

Much of the work lawyers get is through referrals. A lawyer who makes a client happy by solving his problem efficiently and creatively is more likely to get referrals than a lawyer whose handling of individual cases runs up transaction costs. In other words, even though a lawyer might make less money in an individual case because he served his client's interests so well and so efficiently, he is likely to make more money in the long run by developing a reputation that continues to attract business.

I know of no evidence that the massive spread of ADR in the Northern District of California has reduced demand for lawyers' services or reduced levels of lawyer compensation. Instead of reducing the demand for services by lawyers, the spread of ADR has caused some modest shifts in the character of some lawyering work and some re-location of the settings in which some of that work is done.

And the spread of ADR has created new job opportunities for a good many lawyers – some of whom receive hefty percentages of their income from working as neutrals instead of as advocates (many report liking the neutral role much better than the advocate role).

12. What the process will actually be in an ADR event is unpredictable and uncontrollable – and unless a lawyer already has a great deal of experience in a variety of ADR settings he will not know how to prepare or how best to handle himself and his client once the process is underway.

One of the advantages of ADR is the opportunity it offers parties to decide what the process will consist of – to determine what process features best fit the circumstances of given cases.

A lawyer or party who is concerned about not knowing what the process will consist of, or that it might take unpredictable turns, should express that concern to the neutral and ask the neutral, in the presence of counsel for the other parties, both to describe in detail the procedures she will follow and to assure the parties that she will not deviate from those procedures unless all participants freely consent (after appropriate explanations and time to consider the matter, without pressure).

In fact, many ADR processes have evolved into quite specific and predictable forms – and if the neutral is experienced and well-trained, the risk that the neutral will take the process in some unpredictable direction is quite small.

A participant in an ADR event in which promised or ordered procedures are not followed would be justified in leaving.

Once a lawyer understands what the ADR process will consist of, preparing for it is no mystery.

> Explain the process to the client – and prepare him for whatever role he will be asked to play. Help him understand that one of the advantages of ADR is that it is far less formal and rigid than litigation -- and that the proceedings are in private settings and confidential. So there is far less reason to be fearful or anxious. If your client will be expected to explain something, have him practice by explaining it to you – and pose questions to him so he can become comfortable answering. Make sure he understands that if he is asked a question that he is not comfortable answering or does not understand, it is perfectly fair for him to say so and to ask to speak to you privately before responding. If there are matters/subjects that you should address, not him, make sure he knows what they are – and that it is OK for him to ask you to answer such questions, even if they are posed to him in the first instance.
>
> Also explain to your client what kinds of behaviors are expected and most effective in these settings. Make sure he understands that being aggressive or volatile or obviously defensive or evasive will not be effective – that the most effective approach, by far, revolves around calm and reasoned confidence.

Make sure your client understands that it is important to listen, and to make it obvious that he (and you) are listening – to encourage the neutral and the other parties to understand that he (and you) are not closed-minded or ideological or so self-absorbed that he cannot hear inputs that do not square with his preconceptions. By being calm, considerate, and willing to listen, and by not reacting with knee-jerk negativity to inputs from others, your client will encourage other parties to listen and to respect his views -- to infer that his positions are and will be based on thoughtful, rational consideration of all the relevant information, including information about how other parties view the situation and what their needs and interests are.

If you (as counsel) prepare for the ADR event thoroughly (by understanding not only the law and evidence, but also the parties' needs/circumstances/ultimate underlying interests), and if you are careful, systematic, and respectful in your presentations, you will be effective. End of mystery.

Follow-up after an ADR session

At the time you first refer the case to ADR, schedule a case management conference for shortly after the ADR event is to be completed.

Require counsel to submit up-dated case development plans (further settlement efforts, discovery and motions, primarily).

Use the learning that ADR provides to help streamline or focus or sequence the remainder of the case development process:

✷Be careful not to violate confidentiality rules✷

➤ Try to identify what needs to be done to make a follow-up ADR session productive.

➢ E.g., focus discovery, set limits on its scope, and fix deadlines for completing it.

Consider taking discovery from experts earlier than it might otherwise be done – if it appears from the ADR session that expert testimony may be the key (to settlement).

➢ E.g., identify motions whose disposition (or briefing) might affect the parties' interest in settlement or their ability to make settlement decisions – and schedule hearings on such motions as early as feasible.

➤ If it appears from the ADR process is that it will be virtually impossible for the parties to settle the case – at least at this juncture –

focus on efficient trial prep and encourage the parties to re-visit the settlement question later.

Contra Referral

Circumstances that Reduce the Likelihood that ADR Would Be Productive

(or that suggest that ADR should be postponed)

– Physical injuries are significant but clearly not stabilized.

– Delay in disposition clearly is in one party's best interest – no incentive to get resolution soon.

– The parties disagree sharply about a question of law that is critical to outcome or settlement – and neither side seems to want to avoid the risk of an unfavorable ruling on that legal question.

– The defendant is a public entity whose litigation decisions are driven by forces well-beyond the litigation itself – and settlement on terms that might well be reasonable in the case at bar would conflict with those forces (e.g., a city council that faces an upcoming election and has recently been lashed in the media for 'caving' in suits against the police or some other city agency).

– The case pits two long time institutional adversaries against one another – adversaries who are driven by mutually exclusive and intensely felt agendas – repeat players, repeat antagonists, lead by cynical decision-makers.

– One party really needs a decisive legal precedent or some other form of relief that only a court could deliver.

WHEN REFERRAL TO ADR MIGHT NOT BE APPROPRIATE

1. Party wants an authoritative statement of law or needs relief only a court can provide

2. Important policies/rights need public airing/vindication

3. Party glued to rights/entitlement thinking and hostile to negotiation.

4. Deep seated ideological hostility and case implicates important interests on agendas beyond the litigation

5. Real agenda is external to the litigation and settlement would frustrate that agenda

6. High stakes that are achievable only through litigation (some 'bet the company' cases?)

7. Disposition would affect many other cases and

a. a party needs to delay that effect, or

b. a party intends to use this case to send a message

8. A party will benefit more from delay than from any disposition available through settlement

9. Case is informationally immature but might have substantial value

adr not approp

KINDS OF CIRCUMSTANCES IN WHICH IT WOULD NOT BE WISE OR APPROPRIATE TO USE ADR

1. The parties need or want an authoritative declaration of what the law is or should be, or their case implicates important public policies or sensitive rights that need to be explored in a public forum or need to be vindicated publicly. Examples could include some civil rights cases or some products liability cases.

2. One or more of the parties is dominated by an intent to secure his "rights" to the full extent the law permits and is deeply hostile to notions of negotiation and compromise.

3. There is deep-seated and long-standing ideological hostility between the parties and the litigation directly implicates matters of great importance on party agendas that extend well beyond the litigation.

4. The litigation is being used as a tool to advance an agenda that is external to the litigation – and settlement clearly would frustrate achievement of that agenda. For example, a party might be using the formal tools of litigation (discovery; motions) to pry information out of a competitor or to depress a competitor's business.

5. The stakes in the case are extremely high and it is clear that for at least one party those stakes can be achieved only through victory in litigation (e.g., a "bet the company" case in which one party could be economically viable only if it secured protections that could be achieved only through a judgment -- a very rare circumstance).

6. Cases whose disposition would affect lots of other cases and (1) at least one of the parties wants to delay that effect or is so concerned about that effect that the party can't afford to address the case at hand on its own merit, or (2) at least one party wants to use the case at hand to send a very public message to parties (or prospective parties) in other cases -- and to do so would require a disposition that is both public and clearly inaccessible through settlement.

7. Cases in which one party clearly will benefit substantially from delay in resolution and the cost of that delay to that party is clearly less than the countervailing costs (transaction costs, interest, etc.).

8. The case might have substantial value but is way too informationally immature to permit parties and counsel to feel some comfort in their assessments of liability or damages and there is little likelihood of substantial gains in efficiency through ADR – e.g., because the parties understand well how to develop the key evidence and are communicating well.

> One common variation on this theme: major elements of value of case not yet ascertainable (e.g., because injury/condition of plaintiff not stabilized).

Which Kind of ADR?

Choosing the most appropriate and most promising type or form of ADR.

See Sander and Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to Mediation-Oriented Model," 11 Harv. Negotiation L. Rev. 1 (2006).

CPR's Screen for Evaluating Cases for ADR – published in one iteration in September of 1998; may be available on the CPR website: www.cpradr.org/eval.htm

a. Mediation:

facilitative

evaluative

both

b. Early Neutral Evaluation

c. Arbitration: non-binding or binding

d. Judicially hosted settlement conference

e. Summary jury or bench trial

f. Mini-Trial

h. Hybrids or sui-generis processes crafted in private sector to fit special needs or circumstances of particular cases.

Let the parties lead in making this decision – if they can agree on the process they would like to use.

Choosing the Most Promising Type of ADR

1. Two principal matters to explore with counsel:

(a) what are the principal barriers to settlement in your case?

(b) what are the principal benefits that you would be looking to ADR to deliver in your situation?

2. Identifying the principal barriers to settlement – what are they?

Informational needs (really)? Procrastination? Communication?

Analysis – including confidence needed by lawyer and/or client

Emotion/anger/personalities (clients/lawyers/everyone)

Meter running (law firm budgeting)

Shelf-life of product/value of delay

Implications of the case re matters exterior to the litigation,

or concern about ripple effects of this case.

3. What are the benefits that ADR could deliver that are most important to you and your client at this stage?

a. Try to settle the case soon?

b. Find center of case and cabin discovery/motion work?

Attack transaction costs.

c. Understand other side's take on the case and objectives?

d. Get second opinions – to develop more confidence (clients, attys)?

ENE

(Early Neutral Evaluation)

ENE: PRINCIPAL PURPOSES

➤ *REDUCE COST AND DELAY*

- ⇨ **CUT THROUGH PLEADINGS TO LOCATE CENTER OF CASE**
- ⇨ **TARGET DISCOVERY/MOTIONS**

➤ *ENHANCE THE QUALITY OF JUSTICE*

- ⇨ **EXPAND PARTIES' INFORMATION BASE FOR DECISIONS ABOUT CASE DEVELOPMENT AND SETTLEMENT**
- ⇨ **IMPROVE ANALYSIS OF LAW AND EVIDENCE**
- ⇨ **SHARPEN JOINDER OF ISSUES**

➤ *CREATE OPPORTUNITY FOR EARLY SETTLEMENT*

- ⇨ **IDENTIFY OBSTACLES TO SETTLEMENT AND DEVELOP FOCUSED PLAN TO ADDRESS THEM**

Problems ENE Can Address

- Poor communication
- Procrastination
- Difficulty confronting case comprehensively & through opponent's eyes
- Unfocused/unnecessary discovery & motions
- Unrealistic clients
- Clients lacking confidence
- Alienated Clients
- "Meter-running"
- Unrealistic lawyers
- Lawyers lacking confidence
- Reluctance to be the first to broach settlement

ESSENTIALS OF THE ENE PROCESS

- **Pre-session Conference Call with all Counsel**

- **Written Evaluation Statements**

- **The ENE Session:**

  1. **Introductions and opening remarks by evaluator**

  2. **Presentations of claims/defenses by parties**

  3. **Responsive presentations by parties**

  4. **Questions by evaluator to clarify, probe**

  5. **Evaluator identifies common ground and possible stipulations**

  6. **Evaluator identifies key disputed issues (issue clarification)**

  7. **Evaluator privately prepares evaluation and reduces it to writing**

  8. **Evaluator asks if parties want to explore settlement before the evaluation is presented and facilitates settlement negotiations if parties agree to do so**

  9. **Evaluator presents evaluation**

  10. **Evaluator asks [again] if parties want to explore settlement**

  11. **Case development planning**

  12. **Discuss and schedule follow-up**

- **Follow-up**

ENE: REFERRAL FACTORS FOR AND AGAINST

FAVORABLE	UNFAVORABLE
MID-SIZE AND COMPLEXITY	VERY COMPLEX
PRETRIAL EFFICIENCIES POSSIBLE or KEY EVIDENCE KNOWN	HUGE VALUE
	VERY SMALL VALUE
ANALYSIS OF EVIDENCE/LAW PIVOTAL AND DIVERGENT	INFORMATIONALLY IMMATURE
LAWYER INEXPERIENCED or UNREALISTIC	PRO SE PARTY
	EMOTION PIVOTAL
CLIENT UNREALISTIC	
	IDEOLOGY CENTRAL
PARTIES NEED PROD	

OFTEN BEST CANDIDATES:

MAINSTREAM BUSINESS, CONTRACT, P.I.; some CIVIL RIGHTS, EMPLOYMENT.

ENE: OVERALL ASSESSMENTS BY USERS

- **BENEFITS OUTWEIGH COSTS:**

  80% - 85%

- **WOULD VOLUNTEER CASE IN:**

  88% - 95%

- **PROCESS WAS FAIR:**

  88% - 98%